No. 17049

IN THE

United States Court of Appeals

For the Ninth Circuit

WILLIAM CARL CUNNINGHAM, ET UX., and GLENN A. PRICE, ET UX., *Appellants*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

On Appeal from the United States District Court for the District of Arizona

(No. Civ.-2962 Phx. and No. Civ.-2963 Phx.)

Appellants' Reply Brief

GREIVE & LAW, *Attorneys*
R. R. BOB GREIVE
RODERICK D. DIMOFF
Attorneys for Appellants.

Seattle 16, Washington
Telephone: WEst 7-4111
4456 California Avenue Southwest

No. 17049

IN THE

United States Court of Appeals

For the Ninth Circuit

WILLIAM CARL CUNNINGHAM, ET UX., and GLENN A. PRICE, ET UX.,
Appellants,

vs.

UNITED STATES OF AMERICA, *Appellee.*

On Appeal from the United States District Court for the District of Arizona

(No. Civ.-2962 Phx. and No. Civ.-2963 Phx.)

Appellants' Reply Brief

GREIVE & LAW, *Attorneys*
R. R. BOB GREIVE
RODERICK D. DIMOFF
Attorneys for Appellants.

Seattle 16, Washington
Telephone: WEst 7-4111
4456 California Avenue Southwest

WEST SEATTLE HERALD

INDEX

TABLE OF CASES

TABLE OF TEXTS

IN THE

United States Court of Appeals

For the Ninth Circuit

WILLIAM CARL CUNNINGHAM, ET UX., and GLENN A. PRICE, ET UX., *Appellants*, vs. UNITED STATES OF AMERICA, *Appellee*.	No. 17049

On Appeal from the United States District Court for the District of Arizona

(No. Civ.-2962 Phx. and No. Civ.-2963 Phx.)

Appellants' Reply Brief

BRIEF STRICTLY IN REPLY TO THE GOVERNMENT

The appellee has resorted to a number of improper arguments in its answering brief, injecting not only statements aimed at personally attacking and insulting counsel for their prosecution of this appeal, but gratuitous libels against the appellants themselves.

I. Denial of the appellants' motion to vacate.

A. Matters dehors the record.

Under the pretext and excuse, or claim, that the appellants went dehors the record in their brief, and not particularly in quest of the truth themselves, coun-

sel for the appellee injected Appendix "C" by way of pages 8, 32, 33 and 34 of their brief.

Appellee's brief page 8 states in part: "FBI agents were sent to investigate the truth of Appellants' affidavits but presented nothing for the Court's record and therefore in fact the Government admits the truth of the affidavits in their entirety. This is not true. The FBI did investigate the matter and made a written report, a part of which is set out in Appendix C, to the effect that Appellants' affidavits are controverted. There was no burden on the court to make the FBI report part of the record."

HOW CAN THE GOVERNMENT IN GOOD CONSCIENCE CONTEND THAT A COURT MAY CONDUCT STAR CHAMBER PROCEEDINGS AND RENDER INTELLIGENT DECISIONS DEHORS THE RECORD?

Our only knowledge of the contents of any of purported FBI report came in the appellee's brief on July 31, 1961. Not only should this court disregard Appendix C and any other "reports" which the appellee may feel tempted to inject into the record at this date, but should also, as a lesson in government doubletalk, examine the statement. It fails to make any claim that the appellants together, or either of them, were drunk on the day of trial. The said Appendix C is merely an emotional pitch to this court to damn the appellants and their counsel.

If Messrs. C. A. Muecke and Sheldon Green desire

to waive their cloak of sovereign immunity, we are very strongly tempted to advise appellant Price to institute an action for per se libel against them for having wrongly accused him of attempting to suborn perjury (Appellee's brief page 33, last paragraph).

The statement from Appendix "C" is not only objectionable as dehors the record, and out of context with the record, but is objectionable as not being under oath, and for the reason that counsel for the appellants were never apprised of its contents nor the contents of any other reports or statements, if there are in fact any "statements."

Appellants, in making their point, were attempting to let this court know that the District Court went outside the record in rendering its decision—that is, did not in any respect apprise the appellants of ANY reasons for its refusal to vacate its order of dismissal for the purpose of renoting their claims for trial. We maintain that all litigants are entitled to the courtesy of being informed of criteria upon which decisions are rendered.

It is not now within the realm of this court to retry appellants' contentions de novo. All proceedings in appellate courts are usually conducted on the record established in the trial court, and not on phony representations of counsel.

Appellants demand that appellee's Appendix "C" be expunged from the record.

B. On the question of drinking.

1. In general.

At page 15 of appellee's brief, the appellee states: "Defense of this appeal by the Government is not an attempt to name call or to further the interests of non-drinkers. The general imbibing in alcohol is not condemned here."

WHY NOT ! ? !

The only sworn testimony and statements in the record are all to the effect that the appellants were sober on the date of trial, October 6, 1959, and that they would have been present in court but for the advice of their counsel.

At page 26 of the appellee's brief, Miss Hash is quoted as saying: "If the Court please, at this time the counsel for plaintiff would like to move to withdraw as counsel for both parties, neither of whom are present or ready for trial."

From the record, it is obvious that the appellants were not present in court. However, the appellee contends, contrary to the appellants' contention, that the appellants were represented by counsel until the District Court granted Miss Hash's motion for leave to withdraw. Miss Hash's motion for leave to withdraw was purely formal—the fact of withdrawal, as shown in the appellant's affidavits, occurred on the previous day; and the appellants were not "ready for trial" in the sense that they were not represented by any member of the bar.

Miss Hash left them to fend for themselves!

2. Changing theories on appeal.

"The general rule is that a person cannot try his case on one theory in the trial court and on another theory in a court of review, whether the result in the trial court is in his favor or against him."* The appellee, having admitted the appellants' sobriety inferentially by having failed to produce evidence to the contrary, cannot now claim that the appellants were drunk, *Grasswick v. Miller,* 82 Mont. 364, 267 Pac. 299.

C. Adjudication with prejudice.

At page 19 of appellee's brief, appellee claims:

"THE GOVERNMENT AGREES THAT THE UNQUALIFIED ORDER OF DISMISSAL OPERATES AS A JUDGMENT OF DISMISSAL WITH PREJUDICE UNDER BOTH STATE AND FEDERAL LAW. *Kuzma v. Bessemer & Lake Erie Railroad,* 3 Cir., 1958, 259 F. 2d 456."

Like a pagan Roman deity who used to preside over doorways, the government speaks out of either end of its head. *Cf.,* Transcript of Record, page 228, where the government states: "Plaintiffs need only file their action again." Where is justice when a party can say one thing to one court, and maintain a contradiction in the very same action to another court?

In conformity with *Peardon v. Chapman,* 3 Cir., 1948.

*5 C.J.S. 863-864, Appeal & Error § 1503.

169 F. 2d 909, 913, this court should reverse the District Court.

II. Abuse of discretion.

It is difficult to resist the observation that the appellee, at page 16 of its brief, did not attempt to assassinate appellant Cunningham's character. Along with the piece of wit injected by appellee, counsel for the appellant should like to point out that the appellant has never been involved in any litigation in any of the Guamanian courts!

Appellee criticizes counsel's choice of words in pointing out an abuse of discretion on the part of the District Court, and points the finger to appellants as having attacked the integrity of a member of the Federal Bench. See § 1583, Appeal & Error, 5-A C.J.S. 36-37, which states:

> "An 'abuse of discretion' does not necessarily imply a bad or improper motive, a wrong purpose, willfulness, prejudice, partiality, or an intentional wrong; it is not ordinarily a term of approach, and does not mean any reflection on the presiding judge of the lower court, or carry with it an implication of conduct deserving of censure.
>
> "In a legal sense, discretion is abused whenever, in its exercise, the court has acted arbitrarily without the employment of its conscientious judgment, has exceeded the bounds of reason in view of all the circumstances, or has so far ignored recognized rules or principles of law or practice as to result in substantial injustice. Also, discretion is abused

where manifest injustice has been done, or substantial rights lost through mere technicalities . . . "

Appellants have a right to call the shots as they see them, and to make reasonable criticism when the occasion arises.

III. Uncontroverted affidavits.

Appellee's reference to the attorney-client privilege is just one more example of ad hominem attempts on the appellants' standing in their community (Appellee's brief page 17).

IV. Inequitable and unconscionable judgments.

It is impossible to resist pointing out the glaring negative pregnant in the following statement of the appellee at page 17 of its brief:

> "THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN PERMITTING A MANIFESTLY INEQUITABLE AND UNCONSCIONABLE JUDGMENT TO STAND."

We maintain, as does the above statement of appellee, that the JUDGMENT was INEQUITABLE and UNCONSCIONABLE, and should not be permitted to stand, at least without reasonable investigation into the

merits of the appellants' motions or petition to vacate and set aside.

Respectfully submitted,
GREIVE AND LAW, *Attorneys*

R. R. BOB GREIVE

RODERICK D. DIMOFF
Attorneys for Appellants

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM CARL CUNNINGHAM, ET UX., and GLENN A. PRICE, ET UX., *Appellants,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 17,049 MOTION AND AFFIDAVIT TO STRIKE

COME NOW the appellants and respectfully move the Court for an order striking pages 20 through 197, inclusive, from the Transcript of Record, and for an order expunging Appendix "C," pages 32 through 34, inclusive, from the Appellee's Brief.

In support of this motion, the appellants submit the following affidavit.

GREIVE AND LAW, *Attorneys*

By .....
For the Appellants

STATE OF WASHINGTON }
COUNTY OF KING } ss.

I, Roderick D. Dimoff, being first duly sworn on oath, depose and say: I am associated with the appellants' attorney of record in this appeal, and make this affidavit in support of the foregoing motion to strike and expunge portions from the record and appellee's brief.

Pages 20 through 197 of the Transcript of Record are unnecessary to an understanding of the issues in-

volved in this particular appeal, and were merely inserted into the record for the purpose of squandering taxpayers' money. As evidence of the proposition that they are unnecessary to this appeal, neither of the parties have made any reference to any of said pages anywhere in their briefs.

Appendix "C," pages 32 through 34 of the Appellee's Brief do not belong in the record of this appeal, in that the District Court has nowhere in the record indicated that it relied on the contents thereof. In addition, there are no guaranties respecting the truth of the contents nor of the authenticity of the purported document referred to in said Appendix "C."

Roderick Shumway

SUBSCRIBED AND SWORN TO before me this 8 day of August, 1961.

[SEAL]

Charles J. Law

NOTARY PUBLIC in and for the State of Washington, residing at Seattle.